**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **RYAN N. KLEWENO** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,070,230 |
| **ROHRS RECYCLING** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **RIVERPORT INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requests review of the August 12, 2014, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Lawrence M. Gurney appears for claimant. Ronald J. Laskowski appears for respondent and insurance carrier (respondent).

## ISSUES

The Administrative Law Judge (ALJ) denied preliminary relief because claimant failed to prove respondent was given timely notice of the June 2, 2014, accidental injury.

Claimant argues respondent was provided with timely notice and respondent had actual knowledge of claimant's injury. Respondent contends the Board lacks jurisdiction to review the preliminary Order. The parties disagree whether the ten-day or 20-day notice periods of K.S.A. 2013 Supp. 44-520(a)(1) apply to this claim.

The sole issue presented for the Board's consideration is: was respondent given timely notice of claimant's injury by accident?[1]

## FINDINGS OF FACT

[1] The Board has jurisdiction to consider the issue of notice pursuant to K.S.A. 2013 Supp. 44-534a(a)(2).

Claimant testified he began working for respondent in April 2014. Respondent is located in LaCrosse, Kansas, and is in the business of "tak[ing] in scrap metal, anything from combines to clothes, and recycling batteries, computers, everything."[2] Claimant testified his position was "yard help,"[3] a job he described as physically demanding.

Claimant alleged that on June 2, 2014, after his lunch break, he was bent over cutting scrap iron with a cutting torch. When he raised up, he caught his heel on a piece of iron and felt a popping sensation in his low back. Claimant was equipped with a two-way radio, as were all of respondent's employees with the exception of one new employee. Claimant testified he reported on the radio, "I hurt my back."[4] He received no response and went from the yard to the shop area inside respondent's facility. Claimant did not identify himself on the radio and, accordingly, other employees would not know who spoke into the radio. Claimant admitted LeRoy Rohr was approximately 40 feet away from where claimant was injured. However, claimant said nothing to Mr. Rohr about his accidental injury.

According to claimant, only Andy McLain, claimant's supervisor, was present in the shop area. Claimant testified he told Andy he "frigged [his] back up."[5] According to claimant, Andy did not respond. Claimant went from the shop to the office area and took his radio off, but he talked to nobody else before leaving work and driving to the emergency room of Grisell Memorial Hospital in Ransom, Kansas. As he was leaving the office, he passed within 20 feet of Kim Rohr, also claimant's supervisor, who was talking to a uniform delivery person at the time. Claimant admitted telling neither Kim nor the uniform delivery person about his alleged accidental injury. Claimant testified he tried to call LeRoy Rohr en route to the hospital, but Mr. Rohr did not answer and claimant left no message.

Lumbar CT and MRI scans were thereafter conducted and claimant received follow up care with Allen L. McLain, D.O.

The following entry is from Dr. McLain's records dated June 5, 2014, three days after the accidental injury:

> SPOKE WITH LEROY ROHR OF ROHR RECYCLING OF LACROSSE. CONCERNING GETIING [sic] AN APPT FOR RYAN TO SEE DR. SHARMA. THIS AUTHOR WAS TOLD THAT THE EMPLOYEE DID NOT REPORT THE ACCIDENT CORRECTLY AND THAT THEY HAVE IN PLACE THAT THEIR EMPLOYEES

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[2] P.H. Trans. at 11.

[3] *Id.*

[4] *Id.* at 13.

[5] *Id.* at 14.

> SHOULD BE TREATED AT HAYS MED OR LACROSSE AND HE CHOSE TO COME TO RANSOM, THEREFORE HE WAS NOT CONSIDERING THIS CASE WORK COMP. PATIENT WAS NOTIFIED AND HE WAS GOING TO THINK ABOUT WHAT TO DO NEXT AND GET BACK TO ME[.] LORETTA BASGALL RN[.][6]

Leroy Rohr testified at the preliminary hearing he is owner and operator of Rohrs Recycling and that claimant did not directly report to him that claimant had sustained a work-related accident or injury. Mr. Rohr testified he heard nothing on the two-way radio about anyone hurting their back on the day of the alleged injury. According to Mr. Rohr, claimant has had no direct conversation with him about his workplace injury.

According to Mr. Rohr, when he hired claimant, they discussed respondent's rules and regulations, including what was expected of employees in the event of a work-related accident. Mr. Rohr testified he and claimant discussed to whom a work-related injury was to be reported and from whom treatment was to be obtained. Mr. Rohr stated he told claimant that if a work-related accident or injury occurred, claimant was to notify Mr. Rohr or his spouse, Kim Rohr. If neither he nor Kim were available, claimant was to notify one of the two supervisors, Andy McLain or Edmond ("Eddy") Meis.

Mr. Rohr testified that when claimant left work on June 2, 2014, he did not have permission to leave respondent's facility or his work station. According to Mr. Rohr, claimant abandoned his job and is no longer considered an employee of respondent. Claimant did not believe he abandoned his job or that his employment had been terminated. Mr. Rohr admitted claimant was not notified he was no longer employed by respondent. Claimant admitted he had no contact with respondent after he left work on June 2, 2014.

Mr. Rohr testified that on June 3, 2014, he received a call from a billing person at Grisell Memorial Hospital, where claimant had sought treatment the previous day. In that conversation, Mr. Rohr was told claimant was being seen for a workers compensation injury. The billing person asked Mr. Rohr for a claim number, to which Mr. Rohr responded he did not have a claim number because her call was his first notification claimant sustained an injury.

Mr. Rohr testified he spoke by telephone to Loretta Basgall, a registered nurse from Grisell Memorial Hospital[7] on June 5, 2014, about a work-related accident. In that conversation, Mr. Rohr denied the claim, indicating claimant did not report the accident correctly and did not go to the right provider for treatment. Ms. Basgall did not go into

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[6] P.H. Trans., Cl. Ex. 2.

[7] Nurse Basgall was employed by Dr. McLain's office, not the hospital. P.H. Trans., Cl. Ex 2.

detail about the alleged accidental injury because, according to Mr. Rohr, to do so would have constituted a HIPAA violation.

Mr. Rohr testified he received a call from a therapist at Grisell Memorial regarding claimant's physical therapy appointments. The call from the therapist occurred after Mr. Rohr received a June 13, 2014, letter from claimant's attorney. Mr. Rohr testified that the letter from claimant's counsel was received on June 16, 2014, and was the first knowledge he had of the manner, date and time of claimant's alleged injury.

The June 13, 2014, letter from claimant's counsel to respondent[8] alleged, *inter alia,* claimant sustained a lower back injury working for respondent at 1:15 p.m. on June 2, 2014, when claimant "[c]aught [his] boot on [a] piece of iron and felt [his] back pop."

Andy McLain, claimant's supervisor, testified at the preliminary hearing that on June 2, 2014, he was working in the yard approximately 125 feet from claimant. Mr. McLain did not hear claimant declare his injury on the two-way radio. Mr. McLain testified he saw claimant in the shop, but did not hear him say anything. Mr. McLain saw claimant leave the shop area, but did not know if claimant talked to anyone before he left respondent's premises.

According to Mr. McLain, he did not know about claimant's alleged accident until two days later, on June 4, 2014, at which time LeRoy Rohr told him about claimant's alleged work-related accident. Mr. McLain admitted it was possible claimant could have said something to him in the shop, but he did not hear it.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-520 states:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

[8] The letter is part of the Division's records and was filed as claimant's seven-day notice of intent supporting the filing of the application for preliminary hearing.

> Notice may be given orally or in writing.
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The purpose of notice is to afford the employer an opportunity to investigate the claim, provide early diagnosis and treatment, and prepare a defense.[9]

The courts must give effect to the express language of a plain and unambiguous statute rather than determine what the law should or should not be.[10]

The undersigned Board member finds, pursuant to K.S.A. 2013 Supp. 44-520(b), respondent waived the notice required by subsection (a) of K.S.A. 2013 Supp. 44-520 because claimant proved by a preponderance of the credible evidence that respondent had actual knowledge of claimant's injury.

The intent of the notice statute could not be clearer regarding an employer's actual knowledge of an employee's injury: if an employee proves the employer had actual knowledge of the employee's injury, notice is waived and need not be proved. Pursuant to K.S.A. 2013 Supp. 44-508(f)(1), "injury" means any lesion or change in the physical structure of the body, causing damage or harm thereto. There is no requirement that the employer's actual knowledge of an injury be received via the employee.

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[9] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[10] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

Respondent acquired actual knowledge of claimant's injury as follows:

1. One of claimant's supervisors, Mr. McLain, testified he learned claimant was claiming he hurt his back at work when he was told about the alleged accident by the owner and operator of respondent, Mr. Rohr, two days after the June 2, 2014, injury. The inference is clear: Mr. Rohr had knowledge claimant was alleging he hurt his back at work for respondent; if Mr. Rohr did not possess that knowledge, he could not have told Mr. McLain about the alleged injury two days after it occurred.

2. Mr. Rohr testified that on June 3, 2014, he received a call from a billing person at Grisell Memorial Hospital. Mr. Rohr was told claimant was being seen for a workers compensation injury and Mr. Rohr was asked for a claim number. Mr. Rohr told the billing person he did not have a claim number because her call was his first notification claimant sustained an injury. Again, the inference is clear: one day after the accident respondent had actual knowledge claimant was alleging a work-related back injury working for respondent for which claimant had received medical treatment at Grisell Memorial Hospital.

3. Mr. Rohr testified he spoke by telephone to Loretta Basgall, a registered nurse at Dr. Allen McLain's clinic, on June 5, 2014, about claimant's work-related accidental injury. Mr. Rohr denied the claim, indicating claimant did not report it correctly and had not gone to the right place for treatment. Ms. Basgall did not go into detail about the alleged accidental injury because, according to Mr. Rohr, to do so would have constituted a HIPAA violation. Once again, respondent was made aware that claimant claimed to have sustained an injury working for respondent. Respondent was also made aware that Dr. McLain was requesting authorization to refer claimant to another physician, Dr. Sharma. Respondent again possessed actual knowledge that claimant was alleging a work-related injury working for respondent; that claimant had received treatment from Dr. Allen for the claimed injury; and that Dr. Allen wished to refer claimant to another doctor for further medical evaluation or treatment.

4. Mr. Rohr received a June 13, 2014, letter from claimant's attorney. Mr. Rohr testified the letter from claimant's counsel was received on June 16, 2014, and constituted his first knowledge of the manner, date and time of claimant's alleged injury. The June 13, 2014, letter alleged, *inter alia,* claimant sustained a lower back injury working for respondent at 1:15 p.m. on June 2, 2014, when claimant "[c]aught [his] boot on [a] piece of iron and felt [his] back pop."

This Board member is persuaded, under the circumstances of this claim, claimant proved respondent had actual knowledge of claimant's injury, thus resulting in the waiver of notice. The ALJ's preliminary hearing Order is therefore reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

The undersigned Board member concludes claimant proved respondent had actual knowledge of claimant's injury and, as a result, the notice required by K.S.A. 2013 Supp. 44-520(a) is waived, pursuant to K.S.A. 2013 Supp. 44-520(b).

## DECISION

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated August 12, 2014, is reversed.

**IT IS SO ORDERED.**

Dated this _____ day of October, 2014.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge

[11] K.S.A. 44-534a(a)(2).